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Let History Be Our Guide: Using Historical Analogies to Analyze State Response to a Post-Granholm Era

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Let History Be Our Guide: Using Historical Analogies to Analyze State Response to a Post-*Granholm* Era

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Behold the rain which descends from heaven upon our vineyards, and which incorporates itself with the grapes to be changed into wine; a constant proof that God loves us, and loves to see us happy!

- Benjamin Franklin[1]

INTRODUCTION

On May 16, 2005, the Supreme Court of the United States handed down its much anticipated decision in *Granholm v. Heald*.[2] The Court held that both Michigan's and New York's wine shipment regulations "discriminate against interstate commerce in violation of the Commerce Clause, Art. I, § 8, cl. 3, and that the discrimination is neither authorized nor permitted by the 21st Amendment."[3]

While this case directly struck down only Michigan's and New York's direct shipment laws, it symbolized something much greater. "Underlying the case [was] a battle between 3,000 small, family-owned wineries in all 50 states that [could not] get national distribution and large wholesalers who oppose direct-to-consumer wine shipments . . . ."[4] This battle has been raging for years. By prohibiting facial discrimination against out-of-state wineries to protect the interests of in-state wineries, the Court handed these small winery owners a victory. However, this is only one victory in a battle that will continue to rage.

Underlying the battle in *Granholm* is the inherent conflict between two constitutional doctrines: the 21st Amendment and the dormant Commerce Clause. The Commerce Clause provides that "Congress shall have Power . . . To regulate

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* J.D. Candidate, 2006, Indiana University School of Law–Bloomington; B.A. & B.S. 2003, Miami University. I would first like to thank my parents for always providing the support and love that have driven me to succeed. I would also like to thank my fiancée, Christie, for putting up with me through three stressful years of law school. I love you all. Thanks also to Professor Alexander Tanford for his advice and guidance during the research phase of this note; and to the Notes and Comments Editors of the *Indiana Law Journal*, in particular Robert Brown.

1. Letter from Benjamin Franklin to the Abbe Morellet, *in* 5 MEMOIRS OF THE LIFE OF BENJAMIN FRANKLIN 289 (William Temple Franklin ed., London, Henry Colburn 1833).

2. 125 S. Ct. 1885 (2005).

3. *Id.* at 1891.

4. Press Release, Wine Institute, Wine Institute Welcomes U.S. Supreme Court Review; Ending Discrimination Promoted by Wholesalers Would be Win for Consumers, Small, Wineries, Tax Collectors and Regulators, *available at* http://www.wineinstitute.org/communications/statistics/supremecourt.htm (December 3, 2004).

Commerce . . . among the several States."[5] From this affirmative grant of power, the Supreme Court has interpreted an implicit or "dormant" limitation on the states' ability to statutorily restrict interstate commerce.[6] In other words, a state cannot impose serious burdens on the flow of interstate goods across its borders.

On the other side of the conflict stands the 21st Amendment, which provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."[7] The Amendment clearly puts alcohol into a different category than all other items of commerce. "What is not clear, however, is precisely to what extent the [A]mendment makes alcohol different."[8] Does it permit states to enact statutes that would otherwise blatantly violate the dormant Commerce Clause? Prior to its decision in *Granholm*, the Supreme Court left this question unanswered, while states freely discriminated against interstate commerce of alcoholic beverages.

Part I of this Note examines the development of dormant Commerce Clause jurisprudence. Part II provides background information about the rise and fall of prohibition in the United States, while Part III analyzes 21st Amendment jurisprudence. Part IV discusses a variety of direct shipment laws, why direct shipment has become such a salient issue in recent years, and how the different circuit courts dealt with the interplay between the 21st Amendment and the dormant Commerce Clause in the years leading up to *Granholm*. Part V analyzes the Court's decision in *Granholm*, focusing specifically on the scope of its holding. Part VI develops an analytical framework for predicting the likely state reponse to *Granholm* through an examination of the states' responses to past unpopular Court decisions.

From this analysis, this Note concludes that states will not simply abandon their discriminatory alcohol regulations without a fight. Likely, states will respond by redrafting facially discriminatory laws to be facially neutral. These seemingly neutral laws will, in effect, perpetuate the discrimination that the Supreme Court sought to prohibit in *Granholm*. The Court will then be presented with a string of cases challenging the constitutionality of these new statutes.

I. DORMANT COMMERCE CLAUSE JURISPRUDENCE

The Commerce Clause gives Congress the power "to regulate Commerce with foreign Nations, and among the several States."[9] This clause clearly grants Congress the affirmative power to regulate interstate commerce. However, the Court has also read the Commerce Clause to limit the states' power to burden or regulate interstate

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5. U.S. CONST. art. I, § 8, cl. 3.

6. Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 279 n.5 (Stevens, J., dissenting) (1984) ("The Commerce Clause operates both as a grant of power to the Congress and a limitation on the power of the States . . . .").

7. U.S. CONST. amend. XXI § 2.

8. Justin Lemaire, Note, *Unmixing a Jurisprudential Cocktail: Reconciling the Twenty-first Amendment, the Dormant Commerce Clause, and Federal Appellate Jurisprudence to Judge the Constitutionality of State Laws Restricting Direct Shipment of Alcohol*, 79 NOTRE DAME L. REV. 1613, 1614 (2004).

9. U.S. CONST. art. I, § 8, cl. 3.

commerce.[10] When Congress passes legislation under its Commerce Clause power, its laws trump state and local laws.[11] Even in the absence of congressional action in a certain area, the federal courts may still find that state regulation in this area impermissibly burdens interstate commerce, thus violating the dormant Commerce Clause. "The dormant Commerce Clause enables federal courts to guard Congress's commerce power against state protectionism."[12] Essentially, only Congress can regulate the flow of goods in interstate commerce; even when Congress is silent regarding interstate commerce, states are not permitted to step in and enact their own regulations.

States can violate the dormant Commerce Clause in two main ways: (1) through discriminating against out-of-state businesses in order to give in-state businesses an economic advantage; or (2) through statutorily imposing regulations that burden interstate commerce.[13] Courts will strike down the first type of violation, "discrimination in fact" or "in practical effect," unless the discrimination can pass muster under intermediate constitutional scrutiny. In order to do so, the state must prove that the discriminatory law supports a legitimate purpose of the state that could not be achieved through less discriminatory means.[14] The second type of violation, burdening interstate commerce, is subject to a lower level of judicial scrutiny. Only clearly excessive burdens in relation to putative local benefits will fail this test.[15]

Before the ratification of the 21st Amendment, the dormant Commerce Clause restricted the states' ability to regulate the importation of alcohol across their borders.[16] This limitation on the states' authority led to severe problems in enforcing state liquor laws that were not being handled adequately at the federal level.[17] This enforcement issue was one of many factors that led Congress to pass the 21st Amendment, which turned over control of alcohol to the states.[18] In the years following the 21st Amendment's ratification, the Court ruled that the Amendment shielded the states'

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10. *Bacchus*, 468 U.S. at 279 n.5 (Stevens, J., dissenting) ("The Commerce Clause operates both as a grant of power to the Congress and a limitation on the power of the States . . . .").

11. U.S. CONST. art. VI § 2 ("The Supremacy Clause").

12. Jason E. Prince, Note, *New Wine in Old Wineskins: Analyzing State Direct-Shipment Laws in the Context of Federalism, the Dormant Commerce Clause, and the Twenty-first Amendment*, 79 NOTRE DAME L. REV. 1563, 1569 (2004).

13. Autumn R. Veatch, Comment, *Where Does the Commerce Clause End and the Twenty-first Amendment Begin Under* Bainbridge v. Turner*?*, 39 NEW ENG. L. REV. 111, 115 (2004).

14. *See* Maine v. Taylor, 477 U.S. 131, 138 (1986) ("[O]nce a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means.") (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

15. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Where [a] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

16. *See* Brannon P. Denning, *Smokey and the Bandit in Cyberspace: The Dormant Commerce Clause, The Twenty-first Amendment, and State Regulation of Internet Alcohol Sales*, 19 CONST. COMMENT. 297, 309 (2002).

17. *See id.*

18. *See* Veatch, *supra* note 13, at 115.

alcohol regulations from the limitations of the dormant Commerce Clause.[19] Gradually, beginning in the 1940s, the Supreme Court shifted from granting state alcohol regulation total immunity from dormant Commerce Clause scrutiny to holding that the federal government retained some control over alcohol regulation.[20] Today, there is no disputing that the federal government still retains some power over the regulation of alcohol. However, the question remains: where should the line be drawn between the dormant Commerce Clause power and the power granted to the states by the 21st Amendment?

II. THE RISE AND FALL OF PROHIBITION

A. The Prohibition Movement

The Prohibition Movement began following the Civil War, with the purpose of fighting "the perceived evils linked with alcoholic beverages."[21] As the movement gained force, many states strictly regulated alcohol within their borders.[22] Kansas became the first state to constitutionally prohibit the production and sale of alcohol.[23] Although challenged in *Mugler v. Kansas*,[24] the Supreme Court upheld Kansas's statute citing the state's broad police powers.[25] The Court recognized that once a state legislature decided upon a method for regulating liquor, "it is not a determination for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination on that question."[26]

However, just one year after the decision in *Mugler*, the Court changed its opinion on the states' broad powers to regulate alcohol. Calling upon the dormant Commerce Clause, the Court held in *Bowman v. Chicago & Northwestern Railway Co.*[27] that, although the states could regulate alcohol within their borders, their regulatory powers began "only after the act of transportation ha[d] terminated."[28] Two years later, the Court held that alcohol which remained in its original package constituted an article in interstate commerce.[29] Under this interpretation, citizens of states prohibiting the sale and manufacture of alcohol could circumvent the prohibition by importing alcohol,

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19. *See, e.g.*, Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939); Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939); State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59 (1936); *infra* notes 54–58 and accompanying text.

20. *See infra* notes 59–70 and accompanying text.

21. Veatch, *supra* note 13, at 116.

22. *See* Russ Miller, Note, *The Wine Is in the Mail: The Twenty-first Amendment and State Laws Against the Direct Shipment of Alcoholic Beverages*, 54 VAND. L. REV. 2495, 2503–04 (2001).

23. *Id.* at 2504.

24. 123 U.S. 623 (1887).

25. *Id.* at 664 ("[T]he state, in exercise of her police powers, may lawfully prohibit the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage . . . .").

26. *Id.* at 662.

27. 125 U.S. 465 (1888).

28. *Id.* at 499.

29. Leisy v. Hardin, 135 U.S. 100 (1890).

removing the out-of-state packaging, repackaging, and then reselling the alcohol to in-state consumers.

To rectify this seemingly absurd loophole in states' temperance regulations, Congress quickly passed the Wilson Act,[30] which stated:

> All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.[31]

Essentially, the Wilson Act gave the states the right to regulate the importation of liquor; however, it only allowed states to regulate out-of-state liquor to the same degree as they regulated in-state liquor. The dormant Commerce Clause still prevented states from banning only the importation of out-of-state liquor.

Although the Wilson Act provided states with broader regulatory power over alcohol, the Supreme Court's interpretation of the Act opened yet another loophole for alcohol importers to exploit. Since the Act prohibited only the sale of liquor and not its importation, consumers avoided violating the act by purchasing intoxicating liquors directly from producers through mail orders.[32] In *Rhodes v. Iowa*,[33] the Court addressed this issue, and much to the dismay of prohibitionists, it ruled that the Wilson Act did not give states that had outlawed the sale and manufacture of alcohol the power to prohibit out-of-state liquor manufacturers from selling and shipping directly to consumers.[34] Under the *Rhodes* interpretation of the Wilson Act, alcohol shipments did not fall under the regulation of state liquor laws until the shipment "arrive[d] at the point of destination and was deliver[ed] there to the consignee."[35] Although the state of Iowa argued that the Act divested alcohol of its interstate nature upon reaching the state border, the Court disagreed. Therefore, states were unable to regulate alcohol shipments until the shipments fell into the hands of the consumers. As a result, "[m]ail order booze, of course, flourished."[36]

In the end, however, temperance advocates prevailed, eventually persuading Congress to strip alcohol of its interstate character, which allowed states to regulate alcohol free from the confines of the dormant Commerce Clause. In 1913, Congress passed the Webb-Kenyon Act,[37] which prohibited the importation of liquor into any

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30. Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121 (2002)) (also known as the "Original Packages Act").

31. *Id.*

32. Prince, *supra* note 12, at 1575.

33. 170 U.S. 412 (1898).

34. *Id.*

35. *Id.* at 426.

36. Prince, *supra* note 12, at 1575 (quoting Sidney J. Spaeth, Comment, *The Twenty-first Amendment and State Control Over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161, 173 (1991)).

37. Webb-Kenyon Act, Pub. L. No. 68-398, 37 Stat. 699 (1913) (officially entitled "An Act

state with the intent to violate the laws of that state. The language of the Webb-Kenyon Act was strikingly similar to what became Section 2 of the 21st Amendment:

> The shipment or transportation, in any manner or by any means whatsoever, of any . . . intoxicating liquor of any kind, from one State . . . into any other State . . . or from any foreign country into any State . . . which said . . . intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used . . . in violation of any law of such State . . . is hereby prohibited.[38]

The Court upheld the constitutionality of the Act in *James S. Clark Distilling Co. v. Western Maryland Railway Co.*,[39] a mere two years before the ratification of the Eighteenth Amendment and the beginning of nationalized Prohibition.

B. National Prohibition: From the Eighteenth to the Twenty-first

Although the Webb-Kenyon Act was an enormous victory for temperance advocates, it did not fully satiate their appetite for Prohibition. In 1919, Prohibitionists finally achieved their ultimate goal with the Eighteenth Amendment's ratification and the beginning of full-scale nationalized Prohibition.[40] Despite pressure in favor of the initial passage of the Amendment, Prohibition was problematic from the start.[41] Due to countless enforcement problems, "[i]t was only slightly more difficult to buy liquor under Prohibition than it had been prior to its passage."[42] Gangsters bootlegging liquor and government corruption led President Harding to eventually concede that Prohibition had evolved into a "nationwide scandal."[43] The federal government's inability to enforce alcohol regulations on a national level led many in Congress to begin pushing for a return to state control of liquor.[44]

In response to the failure of the "noble experiment," the states ratified the 21st Amendment, which officially ended national Prohibition.[45] The Amendment is split into three sections, with the first expressly repealing the Eighteenth Amendment[46] and the third setting a seven-year time limit on ratification.[47] The most important of the three parts is Section 2, which declares that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."[48] While the

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Divesting intoxicating liquors of their interstate character in certain cases") (codified as amended at 27 U.S.C. § 122 (2000)).

38. *Id.*

39. 242 U.S. 311 (1917).

40. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

41. *See* Marc Aaron Melzer, Comment, *A Vintage Conflict Uncorked: The 21st Amendment, the Commerce Clause, and the Fully-Ripened Fight over Interstate Wine and Liquor Sales*, 7 U. PA. J. CONST. L. 279, 283 (2004).

42. *Id.* at 283–84.

43. LAURENCE F. SCHMECKEBIER, THE BUREAU OF PROHIBITION 46 (1929).

44. Prince, *supra* note 12, at 1576–77.

45. U.S. CONST. amend. XXI.

46. *Id.* § 1.

47. *Id.* § 3.

48. *Id.* § 2.

Eighteenth Amendment gave "concurrent power to enforce" prohibition to the federal government and states,[49] the 21st Amendment appeared to give the states alone the power.[50]

III. 21ST AMENDMENT JURISPRUDENCE

A. *The "Absolutist" Approach:* State Board of Equalization v. Young's Market Co.[51]

The 21st Amendment holds a unique position in our Constitution as the only amendment to "repeal[] one constitutional provision and create[] an exception to another."[52] The speed at which Congress repealed national Prohibition through the enactment of the 21st Amendment is a true example of "the will of a nation speaking through its constitutional process."[53] But what was the will of the nation at that time? Was it to simply give the states the power to make the prohibition choice for themselves, or did it grant the states a broader power to regulate alcohol completely, as the Amendment's plain text may suggest?

In the early years following ratification, the Supreme Court took a very literal, textual approach to the interpretation of Section 2, holding that it granted the states absolute power to regulate alcohol unfettered by the confines of the dormant Commerce Clause.[54] In *State Board of Equalization v. Young's Market Co.*, the plaintiffs challenged a five hundred dollar importers' license fee that applied only to out-of-state alcohol importers, claiming that the fee violated both the Commerce Clause and the Equal Protection Clause of the Fourteenth Amendment.[55] Although the Court found both arguments unconvincing and ruled for the defendants, the Court did give some definition to the bounds of the 21st Amendment. Justice Brandeis, in his majority opinion, responded to the plaintiffs' claim that the fee violated the dormant Commerce Clause:

> Prior to the [21st] Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege [of importing alcohol]. . . . [But the 21st Amendment] confer[s] upon the state the power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs . . . request us to construe the [A]mendment as saying, in effect: The state may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its boarders [sic]; but if it permits such manufacture and sale, it must let

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49. U.S. CONST. amend. XVIII.

50. *See* U.S. CONST. amend. XXI, § 2.

51. 299 U.S. 59 (1936).

52. Swedenburg v. Kelly, 358 F.3d 223, 227 (2d Cir. 2004).

53. *Id.*

54. *See, e.g.*, Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939) (holding that a state's right to regulate the importation of intoxicating liquors is not limited by the Commerce Clause); Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939) (same); *Young's Mkt.*, 299 U.S. at 63 (holding that Section 2 of the 21st Amendment trumped the Commerce Clause's prohibition of discriminatory treatment of out-of-state business when dealing with alcohol).

55. *Young's Mkt.*, 299 U.S. 59.

> imported liquors compete with the domestic on equal terms. *To say that, would involve not a construction of the [A]mendment, but a rewriting of it.*[56]

The implication of this opinion is clear. The Court endorsed the idea that the 21st Amendment unconditionally grants the states the power to regulate alcohol.[57] In a series of subsequent opinions, the Court continued to interpret the 21st Amendment as completely divesting alcohol of its interstate character, thereby leaving alcohol regulations free from dormant Commerce Clause restriction.[58]

B. Pulling Back on States' Power

Approximately ten years after its landmark decision in *Young's Market*, the Supreme Court began to pull back on its unconditional grant of state power. A series of cases in the 1930s and 1940s started a trend toward retracting states' power to regulate alcohol.[59] A pair of decisions in 1964 clarified the idea that there were definite limits to states' regulatory power over alcohol.[60]

In *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, a duty-free shop located in New York City's John F. Kennedy Airport challenged a New York statute that prohibited the sale of duty-free alcohol within the airport.[61] New York argued it had the right to regulate alcohol sales under the broad powers granted in the 21st Amendment. The Court disagreed, holding that while New York has strong regulatory powers over alcohol, it cannot "prevent completely the transportation of liquor across the state's territory for delivery and use in a federal enclave within it."[62] The Court specifically rejected the idea that the 21st Amendment somehow "operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned" as "an absurd oversimplification."[63] Going further, Justice Stewart stated, "If the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect."[64]

For the first time, the Court suggested that the Commerce Clause did, in fact, continue to exert some power over the interstate nature of alcohol commerce: "Both

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56. *Id.* at 62 (emphasis added).

57. Matthew J. Patterson, Note, *A Brewing Debate: Alcohol Direct Shipment Laws and the Twenty-first Amendment*, 2002 U. ILL. L. REV. 761, 772.

58. *See, e.g.*, *Joseph S. Finch*, 305 U.S. 395; *Indianapolis Brewing*, 305 U.S. 391.

59. *See, e.g.*, Carter v. Virginia, 321 U.S. 131 (1944) (law requiring a permit to transport alcohol in the state was found to be outside the bounds of the 21st Amendment because the liquor was not intended for delivery or use within the state); Duckworth v. Arkansas, 314 U.S. 390 (1941) (same); Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938) (holding that state authority did not apply in areas under the jurisdiction of the federal government, such as parks and federal military reservations, even when those areas were within the borders of that state).

60. Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964).

61. *Hostetter*, 377 U.S. 324.

62. *Id.* at 333.

63. *Id.* at 331–32.

64. *Id.* at 332.

the 21st Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case."[65] Thus, *Hostetter* introduces the emerging "accommodation test" that would later guide the Supreme Court's approach to resolving conflicts between the Commerce Clause and the 21st Amendment.[66]

In another opinion delivered on the same day, the Supreme Court struck down a Kentucky law that placed a ten cents per gallon tax on imported liquors.[67] Again, the State argued that such a regulation was properly within the powers vested in the State by Section 2 of the 21st Amendment; again, the Court disagreed. This time the Court rested its decision on a different constitutional provision, holding that the 21st Amendment did not trump the Import-Export Clause of the Constitution.[68] Justice Stewart stated that the Court "has never so much as intimated that the 21st Amendment has operated to permit what the Export-Import Clause precisely and explicitly forbids."[69] According to Stewart, to sustain the Kentucky tax would be to support the notion that the 21st Amendment had repealed the Export-Import Clause so far as alcohol is concerned, a notion that the Court expressly rejected.[70]

The combination of *Hostetter* and *James B. Beam* solidified the idea of constitutional limitations on the states' 21st Amendment rights to regulate alcohol and paved the way for further erosion of such rights. By the 1970s, the Court began to show signs that the limits on state power were going to continue shrinking. This era culminated in the landmark *Bacchus* case, setting forth the greatest limitation on states' 21st Amendment regulatory powers.

C. The Modern Era of Accommodation

In the early 1980s, the Supreme Court completely embraced the modern jurisprudential era of accommodation. In *California Retail Liquor Dealers Association v. Midcal Aluminum Inc.*, the Court ruled that a state's liquor laws can violate the Sherman Act.[71] Midcal Aluminum succeeded on its antitrust challenge to a California statute that divided the state into three "trading areas" and provided that a single wholesaler could set prices that would bind all other wholesalers in the trading area.[72] The Court agreed with Midcal's argument that this system was nothing more than an elaborate price fixing scheme that violated the Sherman Act. California responded that its laws did not fall under the authority of the Sherman Act since they were protected under the 21st Amendment. In the majority opinion, the Court recognized that it had historically interpreted the 21st Amendment very literally, granting broad regulatory

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65. *Id.*

66. *See* Clayton L. Silvernail, Comment, *Smoke, Mirrors, and Myopia: How the States Are Able to Pass Unconstitutional Laws Against the Direct Shipping of Wine in Interstate Commerce*, 44 S. TEX. L. REV. 499, 521 (2003).

67. Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964).

68. *Id.* at 345–46.

69. *Id.* at 344.

70. *Id.* at 345–46.

71. 445 U.S. 97 (1980).

72. Silvernail, *supra* note 66, at 523.

power to the states. However, the Court continued, "the Federal Government retains some Commerce Clause authority over liquor,"[73] and "there is no bright line between federal and state powers over liquor."[74] The Court also held:

> The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case."[75]

Throughout the rest of the decade, the Supreme Court continued to add to *Midcal*'s foundation to create what is now known as the "accommodation doctrine," the modern analytical framework used to approach 21st Amendment jurisprudence.[76]

Bacchus Imports v. Dias, the quintessential example of the modern accommodation doctrine, is the current controlling Supreme Court case for 21st Amendment issues.[77] Finally, the Court directly pronounced that the dormant Commerce Clause applied to state alcohol regulation despite the grant of state power from the 21st Amendment. Up until *Bacchus*, previous cases never expressly stated that the dormant Commerce Clause applied; in fact, the Court maintained in most cases that the states retained the sole power to regulate alcohol within their borders.[78]

In *Bacchus*, the plaintiffs challenged a twenty percent Hawaiian liquor tax that exempted locally produced alcoholic drinks.[79] For the first time, the Court used the dormant Commerce Clause to strike down a state liquor law and held that Hawaii could not place a tax on out-of-state liquor while using an exemption to favor in-state alcohol.[80] Instead of using the 21st Amendment to analyze the tax, the Court first discussed the issue of economic protectionism under the dormant Commerce Clause.[81] Only after determining that the tax violated the dormant Commerce Clause as a

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73. *Midcal*, 445 U.S. at 108.

74. *Id.* at 110.

75. *Id.* (internal citations omitted).

76. Silvernail, *supra* note 66, at 524; *see, e.g.*, 44 LiquorMart, Inc. v. Rhode Island, 517 U.S. 484 (1996); North Dakota v. United States, 495 U.S. 423 (1990); Healy v. Beer Inst., 491 U.S. 324 (1989); South Dakota v. Dole, 483 U.S. 203 (1987); 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987); Maine v. Taylor, 477 U.S. 131 (1986); Brown-Forman Distillers v. N.Y. State Liquor Auth., 476 U.S. 573 (1986); Bacchus Imps., Ltd. v. Dias, 468 U.S. 263 (1984).

77. 468 U.S. 263.

78. *See* Eric T. Freeman, Comment, *The Twenty-first Amendment and the Commerce Clause: What Rationale Supports* Bacchus Imports*?*, 13 HASTINGS CONST. L.Q. 361, 383 (1986) (noting that *Bacchus* exceeded any precedent and was, in fact, a new interpretation of Section 2 of the 21st Amendment).

79. *See Bacchus*, 468 U.S. at 265.

80. *Id.* at 274–75.

81. *Id.* at 270.

discriminatory measure designed to protect the local "ti root okolehao"[82] industry did the Court address the issue of whether the 21st Amendment could save the tax.[83]

In addressing this issue, the Court continued to pull away from the broad language in *Young's Market*. To support its decision to further erode state power under the 21st Amendment, the Court cited the "obscurity of the legislative history of § 2"[84] and the development of the accommodation doctrine through *Hostetter* and *Midcal*.[85] Citing *Hostetter*, the Court stated that "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution [and] each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case."[86] Finally the Court held:

> State laws that constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor. Here, the State does not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment, but instead acknowledges that the purpose was "to promote a local industry."[87]

Although somewhat ambiguous, the Court's holding seems to indicate that temperance may be the only viable purpose for state alcohol regulations. Under the authority of *Bacchus*, today's heated direct shipment debate has come to fruition.

IV. DIRECT SHIPMENT LITIGATION

A. Varieties of Direct Shipment Laws

Most states have developed a three-tiered regulatory system for the distribution and taxation of wine. Wine producers must first register with the Alcohol and Tobacco Tax and Trade Bureau to obtain a basic permit to produce their product. The producer then sells its wine to a licensed wholesaler who is responsible for paying the excise taxes.[88] The wholesaler then distributes the wine to retailers who collect sales taxes from retail consumers.[89]

After Prohibition, the three-tiered system developed with the goals of "reduc[ing] organized crime, monopolies, and the sale of alcohol to minors while providing a more efficient means of tax collection and promoting temperance by keeping the price of

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82. "Okolehao" is a brandy distilled from the root of the Ti plant—an indigenous Hawaiian shrub. *Id.* at 265.

83. *Id.* at 274.

84. *Id.*

85. *Id.* at 275.

86. *Id.* (quoting Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964)).

87. *Id.* at 276 (internal citations omitted).

88. FED. TRADE COMM'N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 5 (2003), *available at* http://www.ftc.gov/os/2003/07/winereport2.pdf [hereinafter FTC REPORT].

89. *See* Kristin Woeste, Comment, *Reds, Whites, and Roses: The Dormant Commerce Clause, the Twenty-first Amendment, and the Direct Shipment of Wine*, 72 U. CIN. L. REV. 1821, 1823 (2004).

alcohol artificially high."[90] States enacted laws regulating the direct shipment of alcohol to make sure that out-of-state producers could not circumvent their regulations.

Three main varieties of direct shipment laws exist: reciprocity laws, limited shipment laws, and antidirect shipment laws.[91] Most states completely prohibit direct shipment.[92]

1. Reciprocity States

Thirteen states are categorized as "reciprocity states."[93] In a reciprocity state, wine producers may ship directly to consumers in other states that have extended a reciprocal right. Simply put, "a winery in your state can ship to a consumer in my state, only if a winery in my state can ship to a consumer in your state."[94] In 1986, California became the first state to enact a reciprocity law regulating the direct shipment of wine.[95] Since then, California has been joined by Colorado, Hawaii, Idaho, Illinois, Iowa, Minnesota, Missouri, New Mexico, Oregon, Washington, West Virginia, and Wisconsin.[96] Although these states all extend some level of reciprocity to each other, "some states are more 'reciprocal' than others."[97]

Reciprocity arrangements are met with stiff opposition from wholesalers and retailers, based on concerns that direct shipments will infringe upon their stranglehold over the market.[98] Because liquor wholesaling and distribution is a multi-billion dollar business, wholesalers and retailers exert strong lobbying power over state legislatures.[99] To protect their market share, wholesalers and retailers use forceful lobbying power to prevent additional states from enacting reciprocity laws.

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90. *Id.*

91. James Molnar, Comment, *Under the Influence: Why Alcohol Direct Shipment Laws Are a Violation of the Commerce Clause*, 9 U. MIAMI BUS. L. REV. 169, 172 (2001).

92. *Id.* For a complete listing of all states and their direct shipment laws, see The Wine Institute, Answers to Frequently Asked Questions About Direct Interstate Wine Shipments, http://www.wineinstitute.org/shipwine/faq/faq.htm (last visited Feb. 12, 2006) [hereinafter The Wine Institute].

93. Reciprocity states include California, Colorado, Hawaii, Idaho, Illinois, Iowa, Minnesota, Missouri, New Mexico, Oregon, Washington, West Virginia, and Wisconsin. *See id.*

94. *Id.*

95. *Id.* California's direct shipment law reads in part:

> Notwithstanding any other law, an individual or retail licensee in a state that affords California licensees or individuals an equal reciprocal shipping privilege, may ship, for personal use and not for resale, not more than two cases of wine (no more than nine liters each case) per month to any adult resident in this state. Delivery of a shipment pursuant to this subdivision shall not be deemed to constitute a sale in this state.

CAL. BUS. & PROF. CODE § 23661.2 (West 2005).

96. *See* The Wine Institute, *supra* note 92.

97. *Id.* For example, Minnesota, Missouri, and Wisconsin only permit their residents to import two cases per year, and Colorado only allows direct shipments if the purchaser makes the purchase in another state and has the wine shipped to his home. *Id.*

98. *Id.*

99. Molnar, *supra* note 91, at 173.

2. Limited Direct Shipping

Limited direct shipment states enact laws allowing out-of-state wineries to ship to their consumers under strict limitations.[100] The majority of these laws follow the Wine Industry Model Direct Shipping Bill proposed in 1997 by the Family Winemakers of California, the Coalition for Free Trade, The Wine Institute, and the American Vintners Association and adopted by the National Conference of State Legislatures, Task Force on the Wine Industry.[101] Usually, these laws contain provisions requiring an out-of-state winery to obtain a license or permit, collect and pay taxes to the recipient state, limit quantities shipped, pack wine in such a way to keep it from underage consumers, and report their shipments to the appropriate state authority.[102]

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100. *Id.* at 172.

101. *See* The Wine Institute, *supra* note 92 (For information on the Model Direct Shipping Bill, click on the hyperlink entitled "What is a Limited Direct/Permit State?" under the "II. Questions about Limited/Direct Shipment States" heading.).

102. The Model Direct Shipment Bill reads:

Add new Section—to the Alcohol Beverage Control Act as follows: Section—

1. Notwithstanding any law, rule or regulation to the contrary, any person currently licensed in any other state as an alcoholic beverage producer, supplier, importer, wholesaler, distributor or retailer who obtains an out-of-state shipper's license, as provided below, may ship up to twenty-four (24) bottles per month of any alcoholic beverage directly to a resident of [State] who is at least 21 years of age for such resident's personal use and not for resale.
2. Before sending any shipment to a resident of [State] the out-of-state shipper must first:
   (a) File an application with the Department of Alcoholic Beverage Control (Department),
   (b) pay a $100.00 registration fee,
   (c) provide to the Department a true copy of its current alcoholic beverage license issued in another state, and
   (d) obtain from the Department an out-of-state shipper's license.
3. All out-of-state shipper licensees shall:
   (a) Not ship more than twenty-four (24) bottles per month to any person.
   (b) Not ship to any address in an area identified by the Department as a "dry" or local option area.
   (c) Ensure that all containers of alcoholic beverages shipped directly to a resident in this state are conspicuously labeled with the words "CONTAINS ALCOHOL: SIGNATURE OF PERSON AGE 21 OR OLDER REQUIRED FOR DELIVERY."
   (d) Report to the Department annually the total of alcoholic beverages, by type, shipped into the state the preceding calendar year.
   (e) Annually pay to the [State Revenue Agency] all sales taxes and excise taxes due on sales to residents of [State] in the preceding calendar year, the amount of such taxes to be calculated as if the sale were in [State] at the location where delivery is made.
   (f) Permit the Department or the [State Revenue Agency] to perform an audit of the out-of-state shipper's records upon request.
   (g) Be deemed to have consented to the jurisdiction of the Department or any other state agency and the [State] courts concerning enforcement of this section and any related laws, rules or regulations.

3. Anti-direct Shipping

Anti-direct shipment states completely forbid out-of-state wineries to ship directly to its consumers.[103] In many of these states, it is even a felony to have wine shipped directly to consumers from an out-of-state winery.[104] The vast majority of these states are located in the southern United States, where wine production and consumption is more limited.

B. Why Has Direct Shipment Become Such a Hot Issue?

In the aggregate, domestic wine production has contributed $45 billion to the national economy.[105] A small number of large wineries dominate the market by distributing through the "three-tier" regulatory system.[106] However, the proportion of American wine produced by small, family farm wineries has increased dramatically in recent years. Estimates show that nearly 3000 such wineries exist throughout all fifty

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4. The out-of-state shipper may annually renew its license with the Department by paying a $__.00 renewal fee and providing the Department a true copy of its current alcoholic beverage license issued in another state.
5. The Department and the [State Revenue Agency] may promulgate rules and regulations to effectuate the purposes of this law.
6. The Department may enforce the requirements of this section by administrative proceedings to suspend or revoke an out-of-state shipper's license, and the Department may accept payment of an offer in compromise in lieu of suspension, such payments to be determined by rule promulgated by the Department.
7. Shipments of alcoholic beverages from out-of-state direct to consumers in [State] from persons who do not possess a current out-of-state shipper's license or other permit or license from the Department are prohibited[.] Any person who knowingly makes, participates in, transports, imports or receives such a shipment from out-of-state is guilty of a misdemeanor punishable by [insert fine and/or jail]. Without limitation on any punishment or remedy, criminal or civil, any person who knowingly makes, participates in, transports, imports or receives such a shipment from out-of-state commits an unfair trade practice.

National Conference of State Legislatures, Task Force on the Wine Industry, Model Direct Shipment Bill (Nov. 5, 1997), *available at* http://www.wineinstitute.org/shipwine/ (For the text of the Model Direct Shipment Bill, click on the "FAQs" link at the top of the page. Then click on the link entitled "What is a Limited Direct/Permit State?" under the heading "II. Questions about Limited/Direct Shipment states." Then click on the link entitled "Model Direct Shipping Bill.").

103. Molnar, *supra* note 91, at 172.

104. *See* FLA. STAT. § 561.545 (1997); IND. CODE §§ 7.1-5-11-1.5, 7.1-5-1-9.5 (2005); KY. REV. STAT. ANN. § 244.165 (West 1996); MD. ANN. CODE art. 2B, §16-506.1 (1999); OKLA. STAT. tit. 37, § 505 (1999) (felony if shipped directly to minor, otherwise direct shipping constitutes a misdemeanor); TENN. CODE ANN. § 57-3-401 (1992); UTAH CODE ANN. § 32A-12-201 (2004).

105. WineAmerica, Wine Facts, http://www.wineamerica.org/newsroom/winefacts04.htm (last visited Oct. 26, 2005).

106. *See* Brief for Respondents at 1, Granholm v. Heald, 125 S. Ct. 1885 (2005) (Nos. 03-1116, 03-1120), *available at* http://www.law.indiana.edu/webinit/ tanford/wine/healdFINAL .pdf.

states—twice the number of thirty years ago.[107] Because these wineries produce only a small amount of wine each year, it is economically infeasible for them to sell their wines through the traditional three-tier system.[108] In fact, most small wineries cannot even find distributors willing to carry their products due to production and volume requirements.[109] The only way these wineries can get their products to consumers is through on-site tasting rooms and direct shipments.

The development of e-commerce has provided these small wineries an amazing opportunity to gain access to a much larger market. By selling wine through the Internet, small wineries are able to place their products into the hands of consumers across the country, many of whom otherwise would not have the opportunity to discover the wine.[110] With the rise of direct shipments, especially via Internet orders, wholesalers and retailers are experiencing an erosion of their current market share. As a result, they have boosted their lobbying efforts in order to pressure state legislatures to enact laws that limit such practices.[111]

In response, small wineries collaborated to fight the wholesalers' attempts to restrict direct sales. The organized wineries turned to the courts, filing lawsuits claiming that state direct shipment laws limiting or prohibiting out-of-state wineries from shipping to in-state consumers violate the dormant Commerce Clause.[112]

C. Current Direct Shipment Litigation: The Circuits' Split

Since *Bacchus*, the constitutional validity of many states' direct shipment laws have been challenged. Many of the challenged laws directly discriminate against out-of-state alcohol producers, while protecting in-state producers by allowing them to sell directly to consumers and forcing out-of-state producers to sell through the three-tier distribution system. Prior to *Granholm,* nearly every circuit court of appeals addressed the issue of direct shipment.[113] However, from this myriad of decisions, no single

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107. *Id.* at 2.

108. *Id.*

109. Molnar, *supra* note 91, at 173.

110. FTC REPORT, *supra* note 88, at 1.

111. Molnar, *supra* note 91, at 173.

112. *See, e.g.*, Swedenburg v. Kelly, 358 F.3d 223 (2d Cir. 2004); Beskind v. Easley, 325 F.3d 506 (4th Cir. 2003); Heald v. Engler, 342 F.3d 517 (6th Cir. 2003); Dickerson v. Bailey, 336 F.3d 388 (5th Cir. 2003); Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir. 2000); Glazer's Wholesale Drug Co. v. Kansas, 145 F. Supp. 2d 1234 (D. Kan. 2001).

113. *Swedenburg*, 358 F.3d at 228 (upholding New York's regulatory scheme that permitted the importation of out-of-state wine *only* if the out-of-state producer maintained a "factory, office, or storeroom" inside the state of New York); *Beskind*, 325 F.3d 506 (overturning a North Carolina regulatory system that exempted in-state wineries from the traditional three-tier distribution system); *Heald*, 342 F.3d at 519 (holding that Michigan's regulatory system that permitted direct shipment from in-state wineries while prohibiting the same practice for out-of-state wineries was "facially discriminatory" and did not promote one of the "core concerns of the State's power under the Twenty-first Amendment"); *Dickerson*, 336 F.3d 388 (5th Cir. 2003) (holding Texas's regulatory system unconstitutional); Bainbridge v. Turner, 311 F.3d 1104 (2002) (holding Florida's regulatory system that exempted in-state wineries from a direct shipment ban violated the dormant Commerce Clause); *Bridenbaugh*, 227 F.3d 848 (upholding Indiana's regulatory system despite a discriminatory impact on out-of-state wineries).

consensus was reached in answering the question—can a state constitutionally discriminate against direct shipment from out-of-state wineries?

V. *GRANHOLM V. HEALD*: THE SUPREME COURT TACKLES THE ISSUE

On May 24, 2004, the Supreme Court consolidated an appeal by the state of Michigan from the Sixth Circuit's decision in *Heald v. Engler* with an appeal by an out-of-state winery from the Second Circuit's decision in *Swedenburg v. Kelly*. The Court granted certiorari, limited to the question, "Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?"[114]

In the Michigan case, the state of Michigan and the Michigan Beer and Wine Wholesalers Association appealed the Sixth Circuit's ruling that Michigan's laws violated the dormant Commerce Clause. Michigan and their wholesalers' contingency joined forces with the New York appeal respondents to argue that their respective states have the power under the 21st Amendment to regulate alcohol, even when such regulations discriminate in favor of in-state wineries. The respondents from the Michigan appeal combined with the petitioners from the New York appeal to argue to the contrary. Due to the confusing nature of the consolidated case, the Michigan petitioners and the New York respondents will be referred to as the "Anti-Direct Shipment Coalition," and the Michigan respondents and New York petitioners as the "Free Trade Group."

The Anti-Direct Shipment Coalition's basic argument was that the 21st Amendment's plain language gives the states the power to rationally regulate the importation of alcohol across their borders. They argued that the Amendment carves out an exception to the dormant Commerce Clause, primarily finding support in *Young's Market*.[115] In an attempt to distinguish *Bacchus*, petitioners state that the "best reading of *Bacchus* is that the tax exemption [in *Bacchus*] was unconstitutional because it did not involve the regulation of the physical importation of beverage alcohol and was admittedly 'mere protectionism.'"[116] Using *Midcal* as primary support, they made this "physical importation" distinction throughout their briefs.[117] They argued that the Michigan regulatory scheme and the New York system give their states the enforcement power necessary to ensure that liquor is effectively monitored and taxed. Furthermore, the Anti-Direct Shipment Coalition argued that no additional regulations are needed for in-state wineries because these wineries are already effectively monitored.[118]

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114. Swedenburg v. Kelly, 541 U.S. 1062 (2004); *see also* Granholm v. Heald, 541 U.S. 1062 (2004). The consolidation of these cases is now known as *Granholm v. Heald.*

115. Brief for Petitioner at 17–18, Granholm v. Heald, 125 S. Ct. 1885 (2005) (No. 03-1116), *available at* http://www.law.indiana.edu/webinit/tanford/wine/granholmmerits.pdf.

116. Brief for Petitioner at 13, Granholm v. Heald, 125 S. Ct. 1885 (2005) (No 03-1120) (quoting Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 276 (1984)), *available at* http://www.law.indiana.edu /webinit/tanford/wine/MBWWAmerits.pdf.

117. *See, e.g., id.* at 14.

118. *Id.* at 13–14.

The Free Trade Group argued that Michigan's and New York's discriminatory regulations violated the dormant Commerce Clause because the laws were facially discriminatory and therefore the Court should apply a "virtually *per se* rule of invalidity."[119] They further argued that the States, under the 21st Amendment, may "regulate intensively, even to the point of prohibition. But [they] may not discriminate."[120] They argued that the States' regulatory schemes were merely economic protectionism and that *Bacchus* should rule. Furthermore, they insisted that the Court had come a long way since the sweeping view of *Young's Market*. The Free Trade Group also recognized that the dormant Commerce Clause cases left open the possibility that statutes that discriminated against interstate commerce could be upheld if they advanced legitimate local purposes that could not be served by reasonable, non-discriminatory means. They then argued that neither Michigan nor New York had even come close to meeting this burden and that reasonable, non-discriminatory alternatives existed.[121]

A. The Court's Decision

On May 14, 2005, the Supreme Court held that both regulatory schemes "discriminate against interstate commerce in violation of the Commerce Clause . . . and that the discrimination is neither authorized nor permitted by the 21st Amendment."[122]

The Court firmly routed its decision in a long standing notion:

> [Prohibiting the discrimination of out-of-state economic interests] is essential to the foundations of the Union . . . [and] "reflects a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."[123]

The Court analogized such discriminatory practices to "an ongoing, low-level trade war" that "invites a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause."[124]

After finding that both Michigan's and New York's discriminatory practices violated the Commerce Clause, the Court turned to the question of whether the regulatory schemes could be saved by the 21st Amendment.[125] The Court was clear in its answer: "Section 2 [of the 21st Amendment] does *not* allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state producers."[126]

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119. Brief for Respondents, *supra* note 106, at 9 (quoting Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)) (emphasis in original).

120. *Id.* at 10.

121. *Id.* at 35–47 (for argument regarding Michigan's scheme); *see also* Petitioner's Brief on the Merits, Granholm v. Heald, 125 S. Ct. 1885 (2005) (No. 03-1274), 2004 WL 2430212 (for argument regarding New York's scheme).

122. *Granholm*, 125 S. Ct. at 1892.

123. *Id.* at 1895 (quoting Hughes v. Oklahoma, 441 U.S. 322, 325–26 (1979)).

124. *Id.* at 1896.

125. *Id.* at 1897.

126. *Id.* (emphasis added).

In answering the States' argument that invalidation of their direct shipment laws would call into question the constitutional validity of the traditional three-tier alcohol distribution system, the Court stated that the three-tier system is "unquestionably legitimate" as long as the State applies the system in a non-discriminatory manner.[127]

After finding that the discriminatory alcohol regulation schemes violated the Commerce Clause and were not saved by the 21st Amendment, the Court turned its inquiry to whether the States' practices "advance[d] a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives."[128] To support their regulatory schemes, the states proffered two primary justifications: "keeping alcohol out of the hands of minors and facilitating tax collection."[129] The Court rejected both justifications stating,

> [T]he States provide little concrete evidence for the sweeping assertion that they cannot police direct shipments by out-of-state wineries. Our Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods. The burden is on the State to show that the discrimination is demonstrably justified. The Court has upheld state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable. Michigan and New York have not satisfied this exacting standard.[130]

With its decision in *Granholm*, the Court may have left the states with only two options: (1) completely prohibit all direct shipment of wine, from both in-state and out-of-state wineries or (2) permit the direct shipment of wine without discriminatory regulations burdening out-of-state wineries' business with in-state consumers. However, as Part VI sets forth, the answer is not that simple.

VI. HISTORICAL ANALOGIES AND THEIR APPLICATION TO DIRECT SHIPMENT

In *Granholm v. Heald*, the Court marked an important shift in how the states may use their powers to regulate direct shipment under the 21st Amendment. States like Michigan and New York, whose laws facially discriminate against out-of-state wineries in favor of in-state vintners, must now rewrite their laws.

However, most states will not simply give up and open their borders to direct shipment from out-of-state wineries. The wholesalers' political lobbying power is too great for any sudden changes to occur in the majority of states. In Florida, for example, Southern Wine and Spirits—the largest liquor wholesaler in the country—successfully lobbied the Florida legislature to pass a law making direct shipment from out-of-state wineries a felony.[131] Prior to the law's passage, Southern contributed over $60,000 to candidates voting in favor of the law.[132] Legislators will be unwilling to part with the

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127. *Id.* at 1905 (quoting North Dakota v. United States, 495 U.S. 423, 432 (1986)).

128. *Id.* (quoting New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988)).

129. *Id.*

130. *Id.* (citations omitted) (emphasis omitted) (internal quotations omitted) (internal parenthetical omitted).

131. *See* Molnar, *supra* note 91, at 175.

132. *Id.*

monetary contributions that wholesaler and retailer lobbyists can provide. Thus, changes will not occur quickly or easily.

If states cannot discriminate against out-of-state wineries, how will legislators continue to appease lobbyists without violating the Supreme Court's mandate? History indicates that states will remove facially discriminatory laws while continuing de facto discrimination against out-of-state wineries by enacting facially neutral statutes.

A. Example: School Desegregation

The history of school desegregation in the United States provides an interesting historical analogy for how states react to unpopular Supreme Court decisions. It is quite possible that states may react in a similar manner to the decision in *Granholm*.

Brown v. Board of Education[133] is arguably the most important Supreme Court decision of the last one hundred years. In the midst of Jim Crow laws and brutal racial discrimination in the South, the Court ordered the desegregation of public schools on May 17, 1954.[134] However, states did not immediately comply with the Court's declaration that "racial discrimination in public education is unconstitutional."[135]

Segregation played an important part in the society of the South, and desegregation was not something to which the southern states would easily succumb. Initially, most school districts simply refused to comply with the Court's mandate. Pupil placement programs and freedom of choice replaced pure segregation in many districts.[136] In fact, all southern states adopted placement laws which granted appointed administrators the power to "place students according to a long list of racially neutral factors such as students' residence, psychological fitness, scholastic aptitude, health and moral standards, . . . and availability of space and transportation."[137] Although under *Brown* states could no longer discriminate on the basis of race, they passed facially neutral laws that divided students among the schools based on factors seemingly unrelated to race. The "purpose and effect of these plans was to enable administrators to maintain segregation, while insulating the system from legal challenge because of the difficulty of proving that a multifactor decision was racially motivated."[138]

States also eschewed desegregation through the use of neighborhood schools. These programs were facially neutral because all students, both black and white, had the power to transfer to a different school. However, because neighborhood schools usually offered "broad transfer rights," allowing students to transfer from one school to another, the effect of the program was the continuation of segregated schools. The vast majority of white students transferred out of their newly desegregated schools into schools that were all white, and most blacks chose not to desegregate as well.[139]

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133. (*Brown I*), 347 U.S. 483 (1954).

134. *Id.* at 483, 495.

135. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 298 (1955) (citing *Brown I* and Bolling v. Sharpe, 347 U.S. 497 (1954)).

136. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 358 (2004).

137. *Id.*

138. *Id.* at 358–59.

139. *Id.* at 359 ("The vast majority of whites exercised minority-to-majority transfer options to leave desegregated schools to which they had been assigned. Most blacks who were eligible

It was not until the end of the 1950s and the beginning of the 1960s that the courts finally cracked down on these de facto discriminatory practices.[140] After *Brown*, Tennessee enacted a Pupil Assignment Law[141] that continued students in their previously enrolled schools and granted exclusive power to local school boards to grant or deny transfer options.[142] The Sixth Circuit held that the law was inadequate in *Northcross v. Board of Education.*[143] According to the court, "[t]he Pupil Assignment Law might serve some purpose in the administration of a school system but it will not serve as a plan to convert a biracial system into a nonracial one."[144]

Tennessee was not easily thwarted in its desire to continue a racially segregated school system. Instead of implementing a plan that might truly desegregate the schools, Tennessee implemented a system of neighborhood schools. The plan provided for "the automatic assignment of pupils living within attendance zones drawn by the Board or school officials along geographic or 'natural' boundaries and 'according to the capacity and facilities of the [school] buildings . . .' within the zones."[145] The plan also offered "free transfers" to any child who had registered in his attendance zone and wished to be transferred.[146] However, black students were systematically denied their "free transfers," and the schools continued to maintain their pre-*Brown* racial identities. It was not until 1968, fourteen years after *Brown*, that the Supreme Court finally granted certiorari to examine this system.[147]

In two cases heard on the same day, the Court struck down the Tennessee system and a similar system in Virginia on the grounds that their plans did "not meet respondent's 'affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'"[148] Even after these decisions, it would be many years before states stopped looking for ways to circumvent the mandate of the Supreme Court.[149]

B. School Prayer

Another line of Court decisions and subsequent state responses might prove insightful in predicting how states will respond to the recent ruling prohibiting discrimination against out-of-state wineries. Forty years have passed since the Supreme

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for desegregation opted out as well.").

140. *See, e.g.*, Shuttlesworth v. Birmingham Bd. of Educ., 162 F. Supp. 372 (N.D. Ala. 1952), *aff'd per curiam*, 358 U.S. 101 (1958).

141. TENN. CODE ANN. §§ 49-1701 to -1740 (1956), *invalidated by* Northcross v. Bd. of Educ., 302 F.2d 818 (6th Cir. 1962), *cert. denied*, 370 U.S. 944 (1962).

142. Monroe v. Bd. of Comm'rs, 391 U.S. 450, 453 (1968).

143. 302 F.2d 818 (6th Cir. 1962), *cert. denied*, 370 U.S. 944 (1962).

144. *Id.* at 821.

145. *Monroe*, 391 U.S. at 453–54 (quoting Monroe v. Bd. of Comm'rs, 221 F. Supp. 968, 974 (W.D. Tenn. 1963)).

146. *Id.* at 454.

147. *See id.* at 450; Green v. County Sch. Bd., 391 U.S. 430 (1968).

148. *Monroe*, 391 U.S. at 458 (quoting *Green*, 391 U.S. at 437–38).

149. Even as late as 1973, the Court was still hearing cases concerning the desegregation of public schools. *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973) (finding that segregative school board activities in a large portion of a school system created a prima facie case of unconstitutional segregation and placed a burden on school authorities to show that other schools within the system were not segregated intentionally).

Court first prohibited the use of official prayers in public schools,[150] yet school systems today still try to find ways to include prayer in the classroom. Much like the response to *Brown*, states fought the decision restricting prayer in the classroom. After *Schempp* and *Engel* prohibited official classroom prayers, states rewrote their statutes to avoid facially violating the Constitution.

For example, Alabama enacted three statutes that seemingly did not violate the mandate from *Schempp* and *Engel*. In 1978, the Alabama legislature enacted section 16-1-20,[151] which "authorized [a] one minute period of silence in all public schools for meditation."[152] In 1981, the legislature added a provision that authorized "a period of silence . . . for meditation or voluntary prayer . . . ."[153] In 1982, the legislature added another provision,[154] permitting teachers "lead willing students in prayer . . . [to] Almighty God . . . the Creator and Supreme Judge of the world."[155] Alabama Senator Donald Homes, the sponsor of the bill that became section 16-1-20.1, admitted on the legislative record that the purpose of the bill was to return voluntary prayer to the schools.[156] These statutes persisted until the Supreme Court struck them down in *Wallace v. Jaffree* in 1985.[157]

Even after the Court ruled that including the words "voluntary prayer" in the Alabama statute violated the First Amendment,[158] the school prayer issue was far from over. States continued to push the constitutional limits of the *Wallace* ruling.

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150. Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

151. The Alabama Code read:

> [a]t the commencement of the first class each day in the first through the sixth grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in.

ALA. CODE § 16-1-20 (Supp. 1986), *invalidated by* Wallace v. Jaffree, 472 U.S. 38 (1985).

152. *Id.*

153. The Alabama Code read, in part, "At the commencement of the first class of each day . . . in all public schools, the teacher in charge . . . may announce that a period of silence . . . shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in." ALA. CODE § 16-1-20.1 (Supp. 1986), *invalidated by* Wallace v. Jaffree, 472 U.S. 38 (1985).

154. The Alabama Code read:

> [f]rom henceforth, any teacher or professor in any public educational institution within the state of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, may lead willing students in prayer, or may lead the willing students in the following prayer to God:
>
> > Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of our Lord. Amen.

ALA. CODE § 16-1-20.2 (Supp. 1984), *invalidated by* Wallace v. Jaffree, 472 U.S. 38 (1985).

155. *Wallace*, 472 U.S. at 40 (internal quotations omitted).

156. *Id.* at 56–57.

157. *See id.* at 48.

158. *Id.* at 60–61.

In 1992, the Court decided *Lee v. Weisman*.[159] In this case, the Court faced the issue of whether a Rhode Island school's practice of inviting a clergyman to offer invocation and benediction prayers during high school graduation violated the First Amendment. The Court ruled that it did.[160]

Despite the Supreme Court's ruling against the use of school-sponsored prayer in 1962, decades passed before the states finally accepted their fate. Using facially neutral laws, the states were able to hold on to a practice that clearly violated the Constitution.

C. Application of Historical Analogies to Direct Shipment of Wine

In each of the historical examples provided, states fought to hold on to practices outlawed by the Supreme Court. In each case, the Court's ruling prohibited a very specific practice. In *Brown*, it was statutorily imposed segregated schools. In *Schempp* and *Engel*, it was official school prayers. These decisions proved unpopular with the states. Instead of accepting the Court's decisions, the states created new plans and schemes to test the Constitution's limits. To appease the mandate of desegregation, states implemented Pupil Placement Programs or neighborhood school systems, essentially holding on to segregation without violating the Constitution. To continue allowing school prayers after their prohibition, states implemented statutes authorizing voluntary prayer or a moment of silence. Because the Court's decisions in *Schempp* and *Engel* did not specifically address these issues, states were able to continue the practice of school-sponsored prayer. In each situation, decades and countless Supreme Court decisions passed before states finally conceded to the true intent of the original decisions in *Brown*, *Schempp*, and *Engle*.

From examining the historical development of desegregation and school prayer laws, we can develop a useful analytical framework that can be applied to the direct shipment issue. First, the Court passes an unpopular decision that requires the states to change their laws. Second, the states respond with resistance. Third, the states apply the Court's decision in the narrowest way and implement new laws which seemingly satisfy the Court's requirements. The new laws, on their face, are completely neutral and constitutional; in application, however, these new laws continue the outlawed practice. Fourth, the Court addresses each new situation individually. With each new decision, the Court seeks to clarify its initial holding. And finally, after many years, the states concede and the outlawed practice is officially abolished.

This same pattern will occur in the coming years as states react to the Supreme Court's decision in *Granholm v. Heald*. While some states may accept the Court's decision outright and implement a completely nondiscriminatory alcohol regulation system, many states will resist change. Further litigation will take place before all facially discriminatory direct shipment laws are struck down. States resisting the shift toward completely opening their borders to direct shipment from out-of-state wineries will rewrite their laws to avoid de jure discrimination against out-of-state wineries. However, the practical effect of these new laws will be to continue de facto discrimination against out-of-state vintners. These states will have no problem finding

159. 505 U.S. 577 (1992).
160. *Id.* at 599.

examples of facially neutral direct shipment statutes that effectually continue discrimination.

Indiana is a prime example of a state that continues to work de facto discrimination against out-of-state wineries. Indiana's direct shipment and alcohol transportation laws prohibit both in-state and out-of-state wineries from directly shipping to Indiana residents.[161] This blanket prohibition of direct shipping inflicts no de jure discrimination against out-of-state wineries and falls within the direction of the Court's opinion in *Granholm*. Indiana farm wineries, however, are authorized to simultaneously act as manufacturer, wholesaler, and retailer, and are thus essentially exempt from the three-tier system that normally prohibits one from holding a license at more than one of these tiers.[162] In other words, an Indiana farm winery can both produce and then sell its wine at retail. Another Indiana provision permits wine retailers to "sell . . . wine . . . for at-home delivery."[163] Hence, a farm winery that also holds a wine retailer's license can make deliveries directly to Indiana residents and completely bypass the three-tier system.

Section 7.1-5-11-1 of the Indiana Code prohibits Indiana residents from importing liquor, except by explicit statutory authorization.[164] Only section 7.1-5-11-15 authorizes importation: "[t]his section shall not prohibit a person . . . from bringing into this state a quantity of liquor or wine not exceeding one (1) quart if he is a traveler in the ordinary course of travel . . . ."[165] On the other hand, in-state wineries can sell directly to customers from their winery premises.[166] Therefore, Indiana residents can bypass the three-tier system by going directly to an in-state winery and purchasing wine. Essentially, in-state wineries in Indiana can sell directly to customers and ship their product to the consumer's home while out-of-state wineries must sell any amount of wine exceeding one bottle through the costly three-tier system.

The inequality of access to Indiana consumers between out-of-state and in-state wineries is de facto discrimination against out-of-state wineries. Through the enactment of facially neutral statutes, Indiana, in effect, discriminates against out-of-state vintners. It will be an interesting issue whether this tangle of alcohol regulations will fall under constitutional scrutiny following the decision in *Granholm*.

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161. The Indiana Code reads, in part: "[i]t is unlawful for a person in the business of selling alcoholic beverages in another state or country to ship or cause to be shipped an alcoholic beverage directly to an Indiana resident who does not hold a valid wholesaler permit under this title." IND. CODE § 7.1-5-11-1.5(a) (2004).

162. Section 7.1-3-14-3 of the Indiana Code prohibits a holder of another permit (i.e., wine wholesaler's permit) from obtaining a wine retailer's permit: "The commission may issue a wine retailer's permit only to the following: (a) A person who is not the holder of, nor an applicant for, any other permit . . . ." IND. CODE § 7.1-3-14-3 (2004). However, section 7.1-3-12-5(a)(5) exempts holders of farm winery permits from the provisions of section 7.1-3-14. Therefore, a native Indiana farm winery may hold both a farm winery permit for the production of wine and a retailer's permit for the sale of wine.

163. *Id.* § 7.1-3-14-4(c).

164. *Id.* § 7.1-5-11-1.

165. *Id.* § 7.1-5-11-15.

166. "The holder of a farm winery permit: . . . (3) is entitled to sell the winery's wine on the licensed premises to consumers either by the glass, or by the bottle, or both . . . ." *Id.* § 7.1-3-12-5(a)(3).

Similarly, in the wake of *Granholm* Michigan and New York can continue to discriminate against out-of-state wineries by passing legislation that only inflicts de facto discrimination. In this way, legislators can assure that New York and Michigan residents have direct access to in-state wineries, while at the same time forcing out-of-state wineries into the costly three-tier distribution system.

Another way that states might continue discriminating against out-of-state wineries is through a discriminatory licensing scheme. Because the Court's decision in *Granholm* maintains that states may implement a discriminatory regulatory scheme that supports one of the core concerns of the 21st Amendment, states could claim that a discriminatory licensing scheme helps raise revenues or ensure an orderly market.[167] Such a scheme might require a more expensive shipping license for out-of-state wineries than for in-state wineries.[168] The additional cost could probably be justified even under *Granholm's* rationale. The Supreme Court will need to review such licensing requirements to determine the cost limits for out-of-state wine shipping licenses.

CONCLUSION

If history can be any guide, states will not give up their direct shipping restrictions without a fight. Following its decision in *Granholm*, the Supreme Court should expect to see states making changes in their direct shipping policies. In response, some states might completely open their borders to out-of-state direct shipping. However, the courts should be prepared for resistance and should expect for these discriminatory practices to continue, as some states attempt to push the constitutional limits of *Granholm's* holding. The true intent of *Granholm* is clear—states cannot treat in-state and out-of-state direct shipping differently. However, it will take time for this true intent to be realized.

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167. *See, e.g.*, Beskind v. Easley, 325 F.3d 506, 516–17 (4th Cir. 2003) (discussing core concerns of the 21st Amendment).

168. *See, e.g.*, NEB. STAT. REV. §§ 53-123.15(4), 53-124(11) (2002) (providing that out-of-state wineries wishing to ship directly to Nebraska residents must obtain a shipping license at a cost of $500); S.C. CODE ANN. § 61-4-747 (Supp. 2004) (requiring out-of-state wineries to obtain a shipper's license to sell directly to a resident of the state); WYO. STAT. ANN. § 12-2-204(c)(ii) (2005) (permitting out-of-state wineries to ship directly to in-state consumers upon obtaining a $50 license); Application for Out of State Wine Shippers License, ABL-571 (rev. July 3, 2003), *available at* http://www.sctax.org/NR/rdonlyres/28A1EE91-3802-4A8B-B261-8D958EFB96DB /0/abl571.pdf (requiring payment of a $600 biennial fee).